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No. 78-613

In the Supreme Court of the United States

OCTOBER TERM, 1978

LINDA RUTLEDGE, *et al.*, *Petitioners*,

v.

LOWELL LONG, Personnel Director for the State Department of Administration, *et al.*, *Respondents*.

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

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LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, Individually and on behalf of all persons similarly situated, *Petitioners,*

v.

LOWELL LONG, Personnel Director for the State Department of Administration; HENRY SCHWALLER, Secretary of State Department of Administration; ROBERT HARDER, Secretary of State Department of Social and Rehabilitation Services; W. VAN ALEXANDER, Personnel Chief, State Department of Social and Rehabilitation Services; and MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS, *Respondents.*

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Kansas

BRIEF IN OPPOSITION

Statement of Facts

The original plaintiffs (petitioners) are Linda Rutledge, Frances D'Annunzio, Janet Skiles and Marlo Spillman. At the time of the filing of the original action they were Kansas Civil Service employees of the Department of Social and Rehabilitation Services of Kansas and each of their job classifications was designated as Social Worker I C. These plaintiffs for the earlier periods of their action had been employees

of Sedgwick County until July 1, 1973, when New Sec. 17 of Chapter 186 of the 1973 Session Laws of Kansas transformed their status to state agency employees.

The petitioners' original petition named five defendants (now respondents): Dr. Robert Harder, Secretary of Social and Rehabilitation Services of Kansas; W. Van Alexander, Personnel Management Chief of the State Department of Social and Rehabilitation Services of Kansas; Henry Schwaller, then the Secretary of the State Department of Administration; Lowell Long, then the Personnel Director for the Department of Administration; and members of the Finance Council for the State of Kansas.

The petitioners filed their original action in the District Court of Sedgwick County, Kansas. Venue of the matter was later changed to the District Court of Shawnee County. The petitioners later attempted to file a second amended petition which would have named the Governor and State Treasurer of Kansas and the Director of the Division of Accounts and Reports of the State Department of Administration as additional defendants. The proposed amended petition also would have added Marvin Dawson as a plaintiff and would have indicated the change of plaintiff Rutledge's name to Sorrel. The petitioners' motion to amend their petition was considered by the trial court simultaneously with the various motions of the defendants (respondents) for summary judgment. Summary judgment for the respondents was granted and that opinion is the subject of the subsequent appeals.

The petitioners had alleged before the trial court

that violations of the state civil service statutes and regulations created violations of state plan contracts with the Secretary of Health, Education, and Welfare and of an express state contract of which the petitioners could supposedly assert claims for increased previous salaries as third party beneficiaries. The petitioners also sought mandamus relief to increase their present and future salaries.

The state of Kansas has filed state plans for, does participate in, and receives federal financial participation for Social Security Act programs including those of Titles I, IV, V, X, XIV, XIX, and XX. Pursuant to Kansas Statutes Annotated 39-708 (frequently amended over this period) the plans have been developed for Kansas by the State Board of Social Welfare and are now developed by the Secretary of Social and Rehabilitation Services of Kansas. The individual holding the Secretary position since its creation in 1974 was the former Director of Social Welfare. However, neither the Director position nor the individual was a member of the former State Board. The continuity and responsibility of the present office of Secretary for the previous State Board is created by statutes, K.S.A. 75-5302 and K.S.A. 75-5311.

No separate merit system was developed in Kansas for the state plans, but the already established state civil service system was utilized. So the petitioners' proposed classes or subclasses would have included Kansas classified civil service social workers who did not work in any programs receiving federal funds. Also no class of any nature was certified.

The state civil service system was under the admin-

istrative control of the State Finance Council. That council on September 17, 1970, set the employment classification for Social Worker I by dividing it into categories of Social Worker I A, Social Worker I B, and Social Worker I C. The classifications were based upon educational qualifications of a college degree without a social work major for I C, a college degree with social work major for I B, and advanced college training for the I A. Each category running from I C to I A was assigned a different ascending salary range. The Department of Health, Education, and Welfare questioned those actions by audit exception, but took no formal sanctions. On April 22, 1974, the council abolished the remaining I C positions and the remaining I C's joined the I B's on the same salary range. (Many I C's who performed financial eligibility functions rather than social services were reclassified to Income Maintenance Worker classifications, including petitioners Rutledge and Spillman.) The petitioners claimed and the trial court found for the purposes of the summary judgment motion that the work done and responsibilities of the I A's and I B's had been the same. The petitioning former I A's claimed that they had been denied the equal pay of the I B's and that they were still assigned to lower ends of salary ranges because of their earlier classification to a lower range.

The trial court found that the plaintiffs had accepted their I C positions without insisting on higher I B positions, that they had failed to exhaust administrative appeal remedies (which they could still exercise and, if necessary, appeal to that court) and that they were not proper third party beneficiaries to assert their proposed contractual rights against the

named defendants, either by state law or by federal provisions of the state plan programs.

After the trial court judgment the petitioners did not utilize administrative appeals, but timely appealed the trial court decision to the Court of Appeals of the State of Kansas. The Court of Appeals with separate comments and also adopting the trial court's findings and conclusions affirmed the trial court's judgment. This respondent did move for modification of those comments and the motion was denied. The petitioners also moved for modification and that motion was denied. The petitioners then petitioned for review by the Supreme Court of the State of Kansas. That court denied the petition and the petitioners have timely filed their petition to this Court.

Argument

The petitioners present no appropriate federal question for review.

The respondents, Secretary of Social and Rehabilitation Services of Kansas and the Personnel Management Chief of the State Department of Social and Rehabilitation Services of Kansas submit that certiorari should not be granted on this matter for the simple reason that the petitioners have never properly presented any substantial federal question which would be appropriate for review.

The petitioners do correctly note that this respondent did request the state court of appeals to modify certain portions of its opinion. To avoid any confusions of an abridged comment, this respondent has

included that full Motion for Modification in Appendix A to this brief.

Even though the considerations of *Seneca Nursing Home v. Kansas State Board of Social Welfare*, 490 F. 2d 1324 (10th Cir., 1974), often cited throughout all stages of this matter, the petitioners' claims for salary changes would not in themselves state a federal question. See also *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1971); *Gully v. First National Bank*, 299 U.S. 109 (1936); and *Utley v. St. Petersburg*, 292 U.S. 106 (1934). So the petitioners would obviously like to demonstrate a conflict between administrative actions in Kansas and rights arising under federal law. The petitioners recite a listing of federal regulations which they assert to have the force and effect of law. Unfortunately their listing and commentary (see P. for Cert., pp. 18, 19 and Ap. G) is cluttered with such irrelevant sections and topics as political expression, right to vote, and layoffs and separations. These distractions may be contrasted with the more interesting omissions.

The petitioners indicate that: "The standards found at 45 C.F.R. Sec. 70.6 and 70.7 (1971) were interpreted by HEW as requiring equal pay for equal work." (P. for Cert., p. 19) Interestingly the petitioners neither support the statement nor actually put it into perspective. We may approach that with several questions. Is "equal pay for equal work" an enforceable right guaranteed by federal law for employees state or federal? Is it a novel question? And has the decision of the state court of appeals radically departed from federal decisions on any substantial federal question?

We may first note that the state court of appeals' opinion states that: "This court on review adopts the findings of fact and conclusions of law as set out in the memorandum decision of the trial court." (P. for Cert., Ap. A, p. 27). The conclusions of law of the trial court specifically rely upon a recent decision of this Court.

> In addition, none of these plaintiffs [petitioners] applied for the higher paying category. It is now clear that one is not entitled to the benefit of a position until he has been duly appointed to it. (*United States v. Testan*, 96 S. Ct. 948) (P. for Cert., Ap. B, p. 37)

Indeed this Court did expressly consider enforcement difficulties of the "equal pay for substantially equal work" principle in its *Testan* opinion:

> We find no provision in the Classification Act that expressly makes the United States liable for pay lost through allegedly improper classifications. To be sure, in the "purpose" section of the Act, 5 U.S.C. §5101, Congress stated that it was "to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work will be followed." And in subsequent sections, there are set forth substantive standards for grading particular positions, and provisions for procedures to ensure that those standards are met. But none of these several sections contains an express provision for an award of backpay to a person who has been erroneously classified. (424 U.S. 392, at 399)

This decision strongly indicates that the petitioners

present unsubstantial questions. See *California Water Service Co. v. Redding*, 304 U.S. 252 (1938) and *Southpark Square Ltd. v. City of Jackson, Miss.*, 565 F. 2d 338 (1977).

The petitioners present shift of emphasis from statutes to regulation provides no better basis. They still show no effective enforcement provisions even in such regulations. Even the section of the purpose of the regulations limit rather than expand the enforcement powers.

> . . . The federal agencies are interested in the development and continued improvement of State merit systems but exercise no authority over the selection, tenure of office, or compensation of any individual employed in conformity with the provisions of such systems. (45 C.F.R. sec. 70.1 (c) included in P. for Cert., Ap. G, p. 60)

The petitioners may even argue that a nonconformity with the provisions of the system indicates that authorities may be implied. But even such implied authorities would be those of the Secretary of Health, Education, and Welfare. The petitioners show no authority to usurp federal powers and authorities, whether implied or express, through any status of contractual third party beneficiaries. Even the case of *McDonald v. Stockton Met. Transit Dist.*, 36 C.A.3d 436 (1973) indicates that the federal agency rather than the petitioners has the election of remedies. Of course, the petitioners' solution to that problem has been to simply ignore the Secretary of Health, Education, and Welfare and not even make it a party to the action. This has not only thwarted the petitioners' belated attempts to envision some federal question,

but also rendered a shambles of petitioners' supposed request to contractually enforce increased salaries by leaving out the federal agency which is the joint obligor for moneys to pay those salaries under the state plan programs such as those under Social Security Act, Titles I, IV, V, X, XIV, and XIX (of which the Petition for Cert. includes certain sections in its Appendix G). Leaving out the Secretary of Health, Education, and Welfare as a party is also a drastic departure from the *Seneca Nursing Home* case *supra* where that secretary has been a party since the amended complaint filed upon that matter's removal to the federal courts.

The petitioners do make a further attempt to indicate that federal questions must be raised by a strange premise that the state court of appeals' ruling on the question of exhaustion of administrative remedies negated all state grounds. (The argument is found in the Petition for Certiorari, pp. 20-21 and strangely continued in Appendix F, p. 47.) The argument is erroneous from its inception when petitioners state that the "court [of appeals] did not in any manner base its holding upon a failure to exhaust an available administrative remedy." (P. for Cert., p. 21) As already indicated the state court of appeals' opinion expressly adopted the trial court's conclusions of law which included the rulings on available administrative remedies. (See P. for Cert., Ap. A, p. 27 and Ap. B, pp. 35-36, 39) Clearly the petitioners' failings to exhaust administrative remedies are endorsed only by themselves. See *Schulze v. Board of Education*, 221 Kan. 351 (1977), *Gordon v. Horder*, 211 Kan. 611 (1973), and *Thompson v. Amis*, 208 Kan. 658 (1972).

Conclusion

The petitioners have raised no novel questions. Nor have they shown the deprivation of any enforceable right guaranteed by federal law. And they have failed to demonstrate that the state court of appeals has radically departed from any federal decisions, let alone a decision of this Court, on any substantial federal question. For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

In the Court of Appeals of the State of Kansas

LINDA RUTLEDGE, FRANCES D'ANNUNZIO, JANET SKILES, and MARLA SPILLMAN, individually and on behalf of all persons familiarly situated, *Appellants,*	)	
v.	)	Case
LOWELL LONG, Personnel Director for the State Department of Administration, HENRY SCHWALLER, Secretary of State Department of Administration, ROBERT HARDER, Secretary of State Department of Social and Rehabilitation Services, W. VAN ALEXANDER, Personnel Management Chief, State Department of Social and Rehabilitation Services, and MEMBERS OF THE FINANCE COUNCIL FOR THE STATE OF KANSAS, *Appellees.*	)	No. 49065

Motion for Modification

COMES NOW the Appellee, Secretary of Social and Rehabilitation Services of Kansas and herein urges this Court to modify and correct certain dicta and factual misapprehensions of its opinion entered in the above captioned matter.

It is neither undisputed nor factual that S.R.S. either established nor modified the multiple pay range system before, during, or after 1974 as indicated by the Court in paragraphs 2 and 4 on page 1 of its opinion. As a matter of both fact and statute the adoptions and changes of classifications and pay range assignment were performed by the Finance Council. See e.g. Plaintiffs' Exhibits 4 *et seq.* as attached to

the Deposition of Lowell Long and K.S.A. 75-2938 in its forms prior to 1976.

Further the Court has also made a serious misapprehension of state plan arrangements in the dicta of its sentences on page 3 which state:

> Neither can the Kansas statutes and regulations be held to be a part of the contract between the state and federal governments, because they can be amended without the consent of the federal government. The plaintiffs have cited no cases where state statutes and regulations were held to be part of the contract involving disbursements of federal grant-in-aid funds and simple logic shows the reason for this: either the contract would be subject to unilateral amendment of its terms by the state, or the state would be contractually bound to refrain from exercising its power to amend its own statutes.

First of all the plaintiffs have cited such a case, *Seneca Nursing Home v. Kansas State Bd. of Social Welf.*, 490 F. 2d 1324 (1974) (although it should be re-emphasized, as was previously briefed, that this and other cases do not support plaintiffs' beneficiary status in this matter). Secondly, but more important, the logic recited by the Court in the above quotation is not appropriate. The federal government does allow unilateral amendment by states in its grant-in-aid programs, but it controls those amendments by continually fixing limitations on the latitude of the amendments. See e.g. *Coe v. Hooker*, 406 F. Supp. 1072, 1078-1079 (D.N.H. 1976). In fact it may

easily be judicially noted that the federal government occasionally even requires or encourages state regulation or even statutory changes as a part of its programs. An obvious example is the child support collection statutes needed for Kansas participation in the Title IV D. program, see 42 U.S.C. sec. 602(a)(26), 42 U.S.C. sec. 654 *et seq.*, and Chapter 210 of the 1976 Session Laws of Kansas, K.S.A. 39-709, 753-759.

S.R.S. and its sister welfare agencies of other states face continual litigation on grant-in-aid programs and it is important that such other litigation not be confused by inappropriate dicta even in an unpublished opinion of an appellate court.

Respectfully submitted,